

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 11, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTATE OF JONNY TORRES, by
and through his Personal
Representative MANUEL BANDA;
JAMIE VALENCIA, parent of Jonny
Torres; and MARIA M. TORRES,
parent of Jonny Torres,

Plaintiffs,

v.

KENNEWICK SCHOOL DISTRICT
#17; a quasi-governmental agency
and agents thereof with knowledge
and responsibility; TAMARA
VASQUEZ, individually and in her
capacity as Nurse at Highlands
Middle School; KENNEWICK
PUBLIC HOSPITAL DISTRICT,
d/b/a TRIOS HEALTH, and agents
thereof with knowledge and
responsibility; DR. WHITNEY FIX-
LANES, in her capacity acting as a
medical doctor for TRIOS HEALTH;
DR. SHEILA K. DUNLOP, in her
capacity acting as a medical doctor
for TRIOS HEALTH; and JOHN and
JANE DOE RESIDENT,

Defendants.

NO: 4:19-CV-5038-RMP

ORDER GRANTING DEFENDANTS
KENNEWICK PUBLIC HOSPITAL,
DR. WHITNEY FIX-LANES, DR.
SHEILA K. DUNLOP, AND
JOHN/JANE DOE RESIDENT'S
MOTION FOR SUMMARY
JUDGMENT

ORDER GRANTING DEFENDANTS KENNEWICK PUBLIC HOSPITAL, DR.
WHITNEY FIX-LANES, DR. SHEILA DUNLOP, AND JOHN/JANE DOE
RESIDENT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 BEFORE THE COURT is Defendants Kennewick Public Hospital District
2 d/b/a TRIOS Health (“TRIOS Health”), Dr. Whitney Fix-Lanes, Dr. Sheila K.
3 Dunlop, and John/Jane Doe Resident’s (the “Medical Defendants”) Motion for
4 Summary Judgment. ECF No. 81. The Court has reviewed the motion, the record,
5 and is fully informed.

6 BACKGROUND

7 This case initially involved several Washington state and federal claims
8 against Kennewick School District #17 and Tamara Vasquez, a nurse employed by
9 Highlands Middle School, regarding the death of Jonny Torres. ECF No. 1. A Jury
10 Trial Scheduling Order was filed June 5, 2019, requiring initial disclosures to be
11 made by June 17, 2019, and expert disclosures to be made by January 16, 2020.
12 ECF No. 18 at 3. Plaintiffs submitted their Fed. R. Civ. P. 26 Initial Disclosures on
13 June 17, 2019, and allegedly identified no expert witnesses. ECF No. 83 at 2.

14 On September 20, 2019, the Court entered an Amended Jury Trial Scheduling,
15 setting forth an expert disclosure deadline of April 16, 2020. ECF 33. This order
16 was vacated on December 19, 2019, before the due date for expert disclosures. ECF
17 No. 40.

18 Prior to filing the First Amended Complaint, Plaintiffs allegedly supplemented
19 their initial disclosures six times and no expert witnesses were identified. ECF No.
20 83 at 2.

21 ORDER GRANTING DEFENDANTS KENNEWICK PUBLIC HOSPITAL, DR.
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1 On December 19, 2019, Plaintiffs filed their First Amended Complaint adding
2 the Medical Defendants and asserted claims of medical negligence pursuant to
3 Washington State law including “negligence, lack of informed consent,
4 negligent medical treatment, and failure to abide by the general standard of
5 care.” ECF Nos. 41 at 26, 42.

6 On August 11, 2020, the Court entered a Second Amended Jury Trial
7 Scheduling Order. To the extent that the parties had not exchanged initial
8 disclosures considering the First Amended Complaint, the parties were to make
9 initial disclosures by September 30, 2020. Per the Court’s Order, the parties were
10 directed to identify their experts and serve written reports by January 28, 2021.

11 On September 11, 2020, the Medical Defendants moved for summary
12 judgment because Plaintiffs allegedly have failed to proffer expert testimony to
13 substantiate their medical negligence claims under Washington State law. ECF No.
14 81. The Medical Defendants maintain that since filing the Amended Complaint,
15 Plaintiffs have not supplemented their initial disclosures or otherwise identified
16 expert witnesses. ECF No. 83 at 3. In the alternative, Defendants move for
17 dismissal with prejudice of the unidentified agent[s] John/Jane Doe Resident named
18 in the Plaintiffs’ Amended Complaint.

19 Plaintiffs take no position in response to the Medical Defendants’ Motion for
20 Summary Judgment. ECF No. 84 at 5. Plaintiffs assert that Defendants Kennewick

1 School District and Ms. Tamara Vasquez (Burn) have not provided evidence in this
2 matter that would meet Washington’s law of fault on medical providers. *Id.* at 4.
3 Plaintiffs state that if the Medical Defendants are dismissed, Kennewick School
4 District¹ will be barred from asserting any affirmative defense apportioning fault to
5 the Medical Defendants. *Id.* at 5. If the Medical Defendants are not dismissed,
6 Plaintiffs project that joint and several liability will be maintained. *Id.* Neither
7 Kennewick School District nor Ms. Tamara Vasquez filed a response to the present
8 motion.

9 LEGAL STANDARD

10 A party is entitled to summary judgment when the “pleadings, depositions,
11 answer to interrogatories and admissions on file, together with the affidavits, if
12 any, show that there is no genuine material issue of fact and that the moving party
13 is entitled to summary judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact
14 is material when it “is relevant to an element of a claim or defense and whose
15
16

17 ¹ Dr. Fix-Lanes allegedly provided a doctor’s note excusing Jonny Torres’ absence
18 from school due to asthma, and further stated that Jonny “is now able to return
19 provided that he dose [sic] not exercise or spend time outdoors while there is
20 smoke in the air. If you have any questions please contact my office.” ECF No.
21 41 at 11. Kennewick School District has asserted that the doctor’s note supplied to
Jonny Torres’ school was “ambiguous” and could have been written more clearly.
See ECF 35-3 at 7, 10.

1 existence might affect the outcome of the suit.” *T.W. Elec.Serv., Inc. v. Pac. Elec.*
2 *Contractors Ass’n*, 809 F.2d 626 (9th Cir. 1987). “Where the record taken as a
3 whole could not lead a rational trier of fact to find for the nonmoving party, there is
4 no genuine issue for trial.” *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475
5 U.S. 574, 587 (1986). If a party fails to properly address another party’s assertion of
6 fact, the court may grant summary judgment if the motion and supporting materials
7 show that the movant is entitled to it. Fed. R. Civ. P. 56(e)(3).

8 DISCUSSION

9 A. Choice of Law

10 The Medical Defendants assert that Washington law, including the
11 requirement that a plaintiff proffer expert testimony, applies to Plaintiffs’ claims of
12 medical negligence and lack of informed consent. ECF No. 81 at 5. Plaintiffs do
13 not argue otherwise. ECF No. 84 at 4 (“A claim of medical negligence requires
14 proof the medical provider violated the standard of care in Washington.”).

15 Where there is no direct conflict between federal and state law, Washington
16 state law will be applied to substantive issues, and federal law will be applied to
17 procedural issues. *Nw. Mut. Life Ins. Co. v. Koch*, 771 F. Supp.2d 1253, 1255 (W.D.
18 Wash. 2009). “Washington courts will not engage in a conflicts analysis unless a
19 true conflict exists.” *Prime Start Ltd. v. Maher Forest Prod., Ltd.*, 442 F. Supp. 2d
20 1113, 1119 (W.D. Wash. 2006).

1 Here, there has been no assertion of Federal law which conflicts with
2 Washington State law regarding medical negligence actions. *See* ECF Nos., 41, 84.
3 Therefore, the Court agrees with the parties that the substantive provisions of
4 Washington State law, including the expert testimony requirements, apply here to
5 Plaintiffs' claims for medical negligence and lack of informed consent.

6 **B. Chapter 7.70 RCW**

7 Under Washington State law, "whenever an injury occurs as a result of health
8 care, the action for damages for that injury is governed exclusively by RCW 7.70."
9 *Fast v. Kennewick Pub. Hosp. Dist.*, 384 P.3d 232, 236–37 (Wash. 2016) (wrongful
10 death claims caused by medical negligence are also subject to the provisions of
11 chapter 7.70 RCW).

12 A claim of medical negligence brought pursuant to RCW 7.70.040(1) requires
13 proof that the medical provider violated the standard of care. *Reyes v. Yakima*
14 *Health Dist.*, 419 P.3d 819, 823 (2018). As acknowledged by Plaintiffs, the
15 applicable standard of care must be established through expert testimony. *Id.*; ECF
16 No. 84 at 4. "[T]o defeat summary judgment in almost all medical negligence cases,
17 the plaintiffs must produce competent medical expert testimony establishing that the
18 injury was proximately caused by a failure to comply with the applicable standard of
19 care." *Watson v. Washington Dep't of Corr.*, No. C17-5968-BHS-TLF, 2018 WL
20 7150488, at *8 (W.D. Wash. Nov. 15, 2018) (citation omitted). A claim for lack of

1 informed consent also requires expert testimony to define the existence and nature of
2 a risk and the likelihood of its occurrence. RCW 7.70.050; *see also Smith v.*
3 *Shannon*, 666 P.2d 351, 356 (Wash. 1983).

4 **C. Expert Disclosures**

5 The Medical Defendants maintain that Plaintiffs have yet to identify experts in
6 support of their claims under Chapter 7.70 RCW. ECF No. 83 at 4. Per the Court's
7 Second Amended Jury Trial Scheduling Order, to the extent that the parties had not
8 exchanged initial disclosures considering the First Amended Complaint, the parties'
9 initial disclosures were due by September 30, 2020. ECF No. 79. Expert disclosures
10 were ordered to be made by January 28, 2020. *Id.* The Medical Defendants
11 preemptively filed this motion on September 11, 2020, prior to either deadline.

12 However, Plaintiffs do not make any argument with respect to the Medical
13 Defendants' assertion of facts or otherwise indicate that expert disclosures are
14 forthcoming. ECF No. 84. Rather, Plaintiffs focus on Defendants Kennewick
15 School District and Ms. Vasquez's inability to raise affirmative defenses against the
16 Medical Defendants should they be dismissed. *See id.* Kennewick School District
17 or Ms. Vasquez have yet to assert a defense or claim against the Medical Defendants
18 and filed no response or objection to the present motion. *See* ECF No. 46 at 24
19 (asserting that "Plaintiffs may have been comparatively at fault").

1 The fact that “Plaintiffs take no position in response to this motion” is
2 surprising. *Id.* at 5. Plaintiffs requested and were granted leave to amend their
3 complaint in order to add the Medical Defendants and assert claims of medical
4 negligence. ECF Nos. 36, 41. Plaintiffs indicate that Kennewick School District
5 and Ms. Vasquez “have not provided evidence in this matter that would meet
6 Washington’s law of fault on medical providers.” ECF No. 84 at 4. However,
7 because these are Plaintiffs’ claims, the Plaintiffs bear the burden of proof. By
8 offering no direct response to the Medical Defendants’ arguments, Plaintiffs concede
9 that they “have not provided evidence in this matter that would meet Washington’s
10 law of fault on medical providers.” *See id.*

11 Although the Jury Trial Scheduling Order currently in effect provides until
12 January 28, 2020, for expert disclosures, in light of Plaintiff’s non-objection to
13 summary judgment on their own claims and the lack of response from the other
14 Defendants, the Court finds that it would be futile to defer its ruling. Rather, the
15 Court finds it appropriate to grant the Medical Defendants’ Motion for Summary
16 Judgment.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Defendants Kennewick Public Hospital District d/b/a TRIOS Health
19 (“TRIOS Health”), Dr. Whitney Fix-Lanes, Dr. Sheila K. Dunlop, and John/Jane
20 Doe Resident’s Motion for Summary Judgment, **ECF No. 81**, is **GRANTED**.

21 ORDER GRANTING DEFENDANTS KENNEWICK PUBLIC HOSPITAL, DR.
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